

June 1, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Don Baker

Date of Filing: May 3, 2010

Case Numbers: TFA-0376
TFA-0384

On May 3, 2010, Don Baker (Appellant) submitted a letter to the Office of Hearings and Appeals. After reviewing the letter, we determined that he was appealing the disposition of two Freedom of Information Act Requests he submitted to the Department of Energy (DOE) Headquarters. The first request, filed on August 31, 2009, was for “a copy of the applications received for [DE-FOA-0000058], including the Application for Federal Assistance SF-424, from these three companies. 1. Southern Company - \$197M for Smart Meters 2. Alliant Energy 3. Portland General Electric.” Request dated August 31, 2009, from Appellant to DOE Headquarters (August 31, 2009, Request). The Appeal of the disposition of the August 2009 request has been designated as Case No. TFA-0376. The second request, filed on December 16, 2009, was for “a copy of any requests for payment that have been submitted by Southern Company” for the “\$165,000,000 in Smart Grid Investment Grants” that the DOE awarded under solicitation numbers DE-FOA-0000058 and DE-FOA-0000036. Request dated December 16, 2009, from Don Baker to DOE Headquarters (December 16, 2009, Request). The Appeal of the disposition of the December 2009 request has been designated as Case No. TFA-0384. These Appeals, if granted, would require DOE Headquarters to release responsive information to the Appellant and would require ORO to conduct a further search for responsive documents.

I. Background

After designating the August 31, 2009, request as number FOIA-2009-000729, DOE Headquarters sent the request to the Office of Electricity Delivery and Energy Reliability. The request was recently referred to the Office of Procurement. E-mail dated May 24, 2009, from Alexander Morris, FOIA Officer, DOE, to Janet R. H. Fishman, Attorney-Examiner,

Office of Hearings and Appeals (OHA), DOE. As of the date of this Appeal, Procurement has not yet responded to this request. *Id.*

DOE designated the December 16, 2009, request as number HQ-2010-000632-F. On April 8, 2010, after initially sending the request to the Office of the Chief Financial Officer, DOE forwarded the request to the Oak Ridge Office (ORO) of the DOE. Memorandum dated April 8, 2010, from Alexander C. Morris, FOIA Officer, DOE, to Amy Rothrock, FOIA and Privacy Act Officer, ORO. On April 19, 2010, ORO responded to the request stating that no “requests for payment” were found for Southern Company Services relating to the two solicitation numbers the Appellant referenced in his request. Determination Letter dated April 19, 2010, from Elizabeth Dillon, Authorizing Official, ORO, DOE, to Appellant. ORO continued that no award has been made under solicitation DE-FOA-0000058, at this time, and no award was made to Southern Company Services under solicitation DE-FOA-0000036. *Id.*

On May 3, 2010, the Appellant challenged the lack of a response to his August 2009 request, claiming that his FOIA request was for “Applications received for American Recovery and Reinvestment Act (ARRA) funding.” Appeal Letter dated April 26, 2010, from Appellant to Director, OHA, DOE. He continued that on August 31, 2009, he requested copies of “Applications received for ARRA funding opportunity DE-FOA-0000058 Smart Grid Investment Grant Program - specifically applications from: Southern Company, Alliant Energy and Portland General Electric.” *Id.* Also in the Appeal, he appealed the determination issued to him on April 19, 2010, by the ORO. In that determination, ORO responded to a request for information the Appellant filed in December 2009 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. ORO stated that it found no documents responsive to the Appellant’s request.

II. Analysis

A. Case No. TFA-0376

As we stated in the Background section above, the Appellant’s August 31, 2009, request was recently reassigned to the Office of Procurement. E-mail dated May 25, 2010, from Alexander Morris, FOIA Officer, DOE, to Janet R. H. Fishman, OHA. Procurement has not yet responded to this request. *Id.* DOE Regulations allow OHA to consider appeals when the Office to which a FOIA request is made “denied a request for records in whole or in part or has responded that there are no documents responsive to the request.” 10 C.F.R. § 1004.8(a). Because DOE has not yet responded to the August 31, 2009, request, this matter is not ripe for our review. The Appellant is permitted to proceed with this matter in federal district court. 5 U.S.C. § 552(a)(6)(C)(i). Therefore, we will dismiss the Appeal,

Case No. TFA-0376, regarding the August 2009 request, and we only need to address ORO's search regarding the Appeal, Case No. TFA-0384.

B. Case No. TFA-0384

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).¹

We contacted ORO to determine what type of search was conducted for requests for payments submitted by Southern Company. In response, ORO indicated that the Chief of the Payment Services Branch conducted the search. Attachment 1 to E-mail dated May 12, 2010, from Linda Chapman, FOIA/Privacy Act Officer, ORO, to Janet R. H. Fishman, Attorney-Examiner, OHA. While the Chief has only been in his position for one year, he has 22 years of experience in the ORO Financial Service Center. He searched the DOE Corporate Accounting System for invoice records. *Id.* Unfortunately, the request only contained the requisition numbers, not the award numbers. *Id.* The Chief searched for awards by the vendor's name, Southern Company. *Id.* He found 11 open awards and three closed awards. *Id.* There was only one award, "Smart Grid Investment Grant Program," close to the dollar amount listed in the request, \$165,000,000, and it was still open. *Id.* The Chief then searched for invoices received from the vendor on that award and found that no invoices have been received. *Id.* Therefore, no payments have been awarded. *Id.* We believe the search that ORO conducted was reasonably calculated to reveal the records responsive to the Appellant's request.

III. Conclusion

In regard to Case No. TFA-0376, DOE has not yet responded to the August 31, 2009, request, therefore, the matter is not ripe for our review. Accordingly, this Appeal will be dismissed. In regard to Case No. TFA-0384, the search that ORO conducted was reasonably calculated to reveal records responsive to the Appellant's December 16, 2009, request. Accordingly, this Appeal will be denied.

^{1/} OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

It Is Therefore Ordered That:

- (1) The Appeal filed by Don Baker, Case No. TFA-0376, is hereby dismissed.
- (2) The Appeal filed by Don Baker, Case No. TFA-0384, is hereby denied.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 1, 2010